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Supreme Court of the United States

OCTOBER TERM, 1949

No. 161

HENRY D. GREEN, DOING BUSINESS AS GREEN HARVESTER AND IMPLEMENT CO., PETITIONER,

versus

ALLIS-CHALMERS MANUFACTURING CO.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Henry D. Green, doing business as Green Harvester and Implement Company respectfully shows to the Court:

A. SUMMARY STATEMENT OF MATTER INVOLVED.

This is a petition for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit to review a judgment of that Court in this case filed on April 4, 1949. The case was begun on January 4, 1946, in the Richland County, South Carolina, Court of Common Pleas. The jurisdictional amount being sufficient and the parties being resident in different states, the case was removed to the United States District Court for the Eastern District of South Carolina, Columbia Division.

The complaint alleged that the petitioner, plaintiff in the District Court, was a dealer for the Allis-Chalmers Manufacturing Company, hereafter referred to as the company, in Columbia, South Carolina, and vicinity, under a dealership agreement dated December 4, 1944, which terminated November 1, 1945. That by the terms of the contract between the petitioner and the company the petitioner agreed to purchase for resale a sufficient quantity of machinery to meet the trade requirements of his territory and to purchase a sufficient quantity of repair parts to service machinery in his territory and to maintain at all times a sufficient stock of repair parts to service properly the machinery in his territory. That on June 20, 1945, the petitioner placed an order with the company for farm machinery, the cost of which was eight hundred ninety-seven thousand eighty-three and 88/100 ($897,083.88) dollars. That the company failed to fill this order as it was bound to do by the terms of the dealership agreement, to the petitioner's damage in the sum of two hundred thousand ($200,000.00) dollars. (R. 1-4.)

The answer of the company denied liability. The answer alleged that the petitioner's order was not placed in

good faith. That the trade area alloted to the petitioner could not have absorbed so large an order. That the company was under no legal obligation to deliver the machinery ordered in the order. That the machinery was not delivered because of the application of voluntary or compulsory priority ratings and the inability of the company to get materials. (R. 5-9.)

The case was heard first before Honorable C. C. Wyche, U. S. District Judge, and a jury on November 17, 1947, and a mistrial was ordered on November 20, 1947, because of the death of a near relative of a juror.

Next, a pretrial conference was had in the case and Judge George Bell Timmerman issued a pre-trial conference order on February 13, 1948 (R. 9-11), limiting the issues in the case, as therein set forth.

The case was tried before Judge Timmerman and a jury on March 23, 1948.

At the trial of the case the petitioner, who was the plaintiff then, proved by his witnesses that in the early part of 1945, when the final stages of World War II were well under way, the company insisted that the plaintiff build a large new building in view of expected sales and increased business (R. 131, 162), and that in order to handle this increased business the petitioner employed extra salesmen and extra mechanics. (R. 132, 138, 147, 164.) The agent for the company told Mr. Green to "go all out" so as to outsell his competitors. (R. 155, 157, 162.) The petitioner proved that, although the order he sent the company was large, he had prospects to sell every piece of the machinery and could have done so with ease in his alloted territory. (R. 132-133, 142-143, 149-151, 164, 166-167, 168.) This fact was not testified to by only one witness but was testified to by six (6), Henry D. Green, Mrs. Nancy Green,

W. O. Burkett, W. L. Herring, D. G. Moore and J. Roy Jones. These last two witnesses were the Richland County Administrative Officer for Agricultural Aid and the Commissioner of Agriculture for South Carolina, respectively, and it was their unqualified opinion that Mr. Green, the petitioner, could have disposed of every piece of the machinery ordered with ease in the area given him to trade in. It was also proved that the petitioner had an ample and entirely sufficient line of credit with which to pay for the entire order placed with the company. (R. 137, 139-141, 159-162.) The petitioner's principal witness on this point was Mr. B. M. Edwards, President of the South Carolina National Bank.

The company, in substantiation of its defense that the petitioner was not entitled to have his order filled, put on the witness stand a witness to explain the allotment system under which the company operated. He testified that the year 1940-41 was considered the base year and the different dealers were alloted a pro rata percentage of the farm machinery produced by the company, according to the amount of machinery that it had sold in the year 1940-41. (R. 32-37.) The petitioner proved by a chart introduced in evidence by the company that in almost every instance the petitioner led all of the other dealers under the Charlotte, N. C. branch office in sales of every type of machinery. (R. 197.) A witness put on the stand by the company, who was an officer of that company, testified that if the petitioner was one of the best dealers in the base period 1940-41 that he was entitled to his proportionate share of the company's machinery manufactured, under the company's allotment system, and if he did not get his proportionate share he did not get what he was entitled to. And, this witness testified, if the petitioner sold more machinery in 1940-41 than the other company dealers he was entitled to receive

more machinery than the other dealers under the company's allotment plan. (R. 179-180.)

The petitioner testified that he paid visits to other company dealers who had smaller territories than he had and these dealers were receiving more machinery from the company than he was. (R. 143-144, 145-146.) In substantiation of his claim the petitioner testified that another company dealer, Mr. R. U. Fox, received so much machinery of certain types that he was forced to advertise in a nationally distributed magazine to get rid of it. (R. 158.) This fact was admitted by Mr. Fox who testified for the company. (R. 176.) The petitioner showed also that he had outsold Mr. Fox in the 1940-41 base period. (R. 197.)

After the testimony in the case was ended the Judge charged the jury on the question of the petitioner's good faith in placing the order with the company in the following terms,

"First, it (the answer of Allis-Chalmers Mfg. Co.) says that the plaintiff's said order was not made in good faith—that the order filed by the plaintiff wasn't a bona fide order * * *" (R. 89.)

"I charge you that the defendant was not required to accept any order from plaintiff which was not submitted in good faith to supply his trade requirements from June 20, 1945, to November 1, 1945. And if you find the plaintiff submitted the order of June 20, 1945, for any reason other than resale in good faith during said period, I charge you that defendant was not required to accept the order for machinery or parts that were intended for resale or distribution after November 1, 1945." (R. 105.)

"I charge you that defendant was not bound to accept plaintiff's order of June 20, 1945, unless plaintiff submitted

the order in good faith. And in deciding whether or not plaintiff submitted the order in good faith, you should take into consideration the plaintiff's past sales record, his knowledge of the availability of machinery for himself and other dealers, whether he formerly accepted machinery under allocation rather than orders, his ability to pay for the machinery, his service and storage facilities, and whether or not plaintiff was prompted by a desire to extend his rights under the dealership contract beyond its term. You may take those matters into consideration and all other matters bearing upon the parties here involved that you find to exist." (R. 106.)

The last two paragraphs of this charge were made at the request of the Allis-Chalmers Mfg. Co.

The Honorable Judge further charged the jury, with respect to the defense of the Allis-Chalmers Mfg. Co. of a voluntary priority plan, in the following terms: "Well, I charge you as a matter of law, if they worked out that form of allocations and if they followed it and they made a reasonable distribution of their products based upon that apportionment, and if they gave to the plaintiff in this case, the representative then in this area, Columbia and vicinity, the proportional part that came to Columbia out of all that they could possibly make and had materials to make, then I say that was a reasonable distribution of their property or their output of their factories, and they could not be held liable because they couldn't produce more and didn't send more." (R. 95.)

"Now, you have heard the testimony on behalf of the defendant that they could not get the materials shipped out of which to make the things that were ordered. Now, if they acted reasonably and did all they could to get materials, and by reason of an inability to get them, they

didn't manufacture more of the things that the plaintiff ordered than they did manufacture, and if under the apportionment system or allocation system which they testified they followed you find that the plaintiff got his full share—that is, the full share that this trade area was entitled to, then the plaintiff would have no cause of action against the defendant. However, the defendant, having set up this voluntary allocation system—this voluntary apportionment to trade areas—if they having done that failed and refused for some cause to give to the dealer in the Columbia trade area, who admittedly was Green, the plaintiff in this case, all of the machinery and parts that he was entitled to, but gave it to somebody else to favor somebody else perhaps or for any cause gave it to somebody else and denied it to him when he was entitled to it for distribution in this area, then they would be liable for such damages as the plaintiff reasonably sustained by their failure to do so; in this case Gentlemen of the jury, what he may have lost by reason of the non-delivery of those goods." (R. 96-97. To the same effect, pp. 90, 93, 98, 99, 103.)

There was no objection of any kind taken to these charges to the jury by the company. After the Judge's charge the Judge specifically asked the counsel for the company whether or not they had any exception to make to the charge and they said that they did not have any.

The jury returned a verdict in favor of the petitioner in the amount of three thousand five hundred eighty-seven and 76/100 ($3,587.76) dollars.

Following the jury's verdict the company made a motion for judgment notwithstanding the verdict, (R. 108-109) which was denied by Judge Timmerman in an order dated August 12, 1948. (R. 109-125.)

The company then appealed to the Court of Appeals, Fourth Circuit, which reversed the decision of the lower Court and remanded the case in order that judgment could be entered for the Allis-Chalmers Mfg. Co.

B. BASIS OF THE COURT'S JURISDICTION.

It is competent for this Court to require by *certiorari* that this case be certified to it for determination pursuant to Act of June 25, 1948, C. 646, Sec. 39, 62 Stat. 992, eff. Sept. 1, 1948, section 1254, Title 28, United States Code.

C. QUESTIONS PRESENTED.

(1) Did not the Honorable Court of Appeals err in holding as follows: "The Appellant contends: (3) that the order was not given in good faith and was not authorized by the contract and therefore the plaintiff was not entitled to delivery of the goods specified in the order. In our opinion the judgment must be reversed on the third ground • • •", (R. 199-200; 173 F. (2d) 818, 819) the error being that whether or not the order was placed in good faith was a question of fact to be decided by the jury upon all of the facts presented in the case and the Judge's charge and for the Court of Appeals to reverse the decision on that ground is to deprive the petitioner of trial by jury which is accorded him by the Seventh Amendment of the United States Constitution?

(2) Did not the Honorable Court of Appeals err in holding as follows: "• • • the judge instructed the jury that if the company did all it could to get materials and manufactured goods and if it apportioned the goods fairly amongst the dealers and gave the plaintiff his fair share for the territory assigned to him, then he had no right to recover; but if the company failed to give the dealer all

that he was entitled to and gave it to somebody else, then the company would be liable in damages in the amount of the net profit which the plaintiff would have earned on the goods that the company failed to deliver. It was doubtless by reason of this charge that the jury found a verdict for a small sum in the plaintiff's favor.

"In our opinion, this instruction was erroneous" * * * (R. 203; 173 F. (2d) 818, 820), the error being:

(a) That there was no exception made by the Appellant to this charge and therefore the Court of Appeals could not reverse the judgment because of it.

(b) That the charge was a proper one under the law and facts of the case and was made on behalf of the company, the appellant, in the Court of Appeals.

(c) The charge presented a question that it was proper for the jury to decide, and for the Court of Appeals to decide it deprived the petitioner of his right to trial by jury under the Seventh Amendment of the United States Constitution.

D. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I

With respect to question (1) and question (2c) presented by this petition it is a matter of grave public concern that this Honorable Court protect the citizens of the United States in their right to trial by jury and to see that that right accorded them by the Seventh Amendment to the United States Constitution is not usurped by the Appellate Courts of this Country. The Court of Appeals for the Fourth Circuit in this decision has taken it upon itself to reweigh the testimony in the case and to determine that the jury did not make a proper finding thereunder. By so doing

the Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions and has decided the case in a manner in conflict with the applicable decisions of this Honorable Court and has departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervision. In the case of *Lavender v. Kurn et al.*, 327 U. S. 645, 653, 66 S. Ct. 740, this Honorable Court laid down the rule thus:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

To the same effect is the decision of *Tennant v. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525.

It is imperative that this court should examine and review this case and see whether the Court of Appeals has not violated this rule so clearly laid down in these two decisions and has not deprived the petitioner of his right to trial by jury. From a mere glance at the record in the case it is clear that there was ample evidence from which the

jury could deduce that the petitioner acted in good faith in placing the order in question and for the Court of Appeals to hold otherwise is to violate the established rules of this Honorable Court.

II A

With respect to question (2a), presented above, we respectfully submit that since there was no exception taken to the Charge of the Trial Judge at the time the charge was given that it was improper for the Court of Appeals to reverse the judgment of the Trial Court on that ground and that in so doing the Court of Appeals decided the case in a manner in conflict with the decisions of other Courts of Appeals on the same matter and has decided a federal question in a way probably in conflict with applicable decisions of this Honorable Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision. From a glance at Rule 51 of the Federal Rules of Civil Procedure it is apparant that the Court of Appeals probably erred in reversing the judgment of the lower court on this ground and therefore *certiorari* should issue in this case.

II B

With respect to question (2b) presented above it is respectfully submitted that the charge of the District Judge that the Court of Appeals took exception to and found erroneous was a proper charge and was made at the request and on the part of Allis-Chalmers Mfg. Co. There being no applicable South Carolina law on the subject the federal law would govern. In overruling the judgment of the District Court because of that charge the Court of Appeals rendered a decision in conflict with the decision of the Court of Appeals of the Fourth Circuit itself, in conflict with the

decision of another court of appeals on the same matter, and the Court of Appeals of the Fourth Circuit has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the supervision of the Supreme Court of the United States.

Wherefore, petitioner prays for the allowance of a writ of *certiorari* to the United States Court of Appeals for the Fourth Circuit in order that this decision may be reviewed and determined by this Honorable Court and that this Court reverse the judgment of the Court of Appeals and direct that the judgment of the District Court in favor of the plaintiff below be reinstated.

Respectfully submitted,

HENRY D. GREEN,
Petitioner.

C. T. GRAYDON,

JOHN GRIMBALL,
Columbia, S. C.,
Attorneys for Petitioner.

June ...., 1949.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Supreme Court of the United States

OCTOBER TERM 1949

No. .....

HENRY D. GREEN, DOING BUSINESS AS GREEN HARVESTER AND IMPLEMENT CO., PETITIONER

versus

ALLIS-CHALMERS MANUFACTURING CO., RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

REFERENCE TO REPORT OF OPINION BELOW

The decision of the District Court is not reported. The opinion of the Court of Appeals for the Fourth Circuit is reported in 173 F. (2d) 818, Advance Sheet No. 6, and in the Record at pp. 199-204.

GROUNDS OF JURISDICTION

This Court has jurisdiction pursuant to Act of June 25, 1948, C.646, Sec. 39, 62 Stat. 992, eff. Sept. 1, 1948, Section 1254, Title 28, United States Code.

STATEMENT OF THE CASE

A summary statement of the case is made in the petition filed herewith under the heading, "A. SUMMARY STATEMENT OF THE MATTER INVOLVED", and leave to omit the same here is prayed, for brevity's sake.

ERRORS TO BE URGED

1. The Court of Appeals for the Fourth Circuit erred in reversing the judgment of the District Court on the ground that the petitioner's order was not made in good faith.

2. The Court of Appeals for the Fourth Circuit erred in reversing the judgment of the District Court on the ground that the Judge should not have charged the jury that when the Allis-Chalmers Mfg. Co. operated its voluntary rationing system it had to do so fairly and give the petitioner the machinery he was entitled to or else be liable to the petitioner in the amount of the net profit he would have earned on the goods that Allis-Chalmers failed to deliver.

SUMMARY OF ARGUMENT

1. In ruling that petitioner's order was not made in good faith and that the District Judge should not have charged that the company had to act bona fide in any voluntary rationing plan it set up the Court of Appeals violated the rules laid down by this Honorable Court in *Lavender v. Kurn et al.*, 327 U. S. 645, 653, 66 S. Ct. 740, 744, and in *Tennant v. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525, and decided the case contrary to the applicable South Carolina decisions.

2. In ruling that the District Judge should not have charged the jury that the company had to act bona fide in

carrying out its voluntary rationing plan the Court of Appeals was in error since no exception was ever taken to this charge and since under the applicable law the charge was a proper proposition of law and made because of a defense set up by the Company and since this was a question for the jury to decide.

ARGUMENT

Point I

The Court of Appeals committed error in ruling that the Petitioner's order was not made in good faith and in ruling that the charge of the District Judge with respect to the Company's voluntary rationing plan was not proper.

The Court of Appeals for the Fourth Circuit ruled that the order sent the company by the petitioner was not sent in good faith and therefore the petitioner was not entitled to recover in this case. In so ruling the Court of Appeals reviewed and rehashed all of the testimony and evidence in the case favorable to the company and concluded that the jury was wrong in reaching the conclusion that it did (R. 199-204; 173 F. (2d) 818-820.) The Circuit Court of Appeals did not refer to, mention or discuss any of the testimony on this question that was favorable to the petitioner, of which there was an abundance. It is interesting to note also that in the entire decision of the Court of Appeals there is not one legal decision of any sort or from any jurisdiction cited to support the conclusion reached by that Court. It appears to us that the reason for this is that there are none or, if there are, they are so few as to be of little or no value.

The evidence and the testimony in the trial to support the petitioner's contention that the order was placed in

good faith was abundant. It was proved that toward the end of World War II the company insisted that the petitioner build a large building in expectation of greatly increased sales. (R. 131, 162.) In order to handle this increase in business the petitioner hired extra salesmen and mechanics. (R. 132, 138, 147, 164.) The Allis-Chalmers Mfg. Co.'s agent told petitioner to "go all out" so as to outsell his competitors. (R. 155, 157, 162.) The petitioner had prospects for every piece of machinery ordered and could have sold it with ease. (R. 132-133, 142-143, 149-153, 164, 166-167, 168.) Six (6) witnesses testified to this, including D. G. Moore, the Richland County Administrative Officer for Agricultural Aid and J. Roy Jones, the South Carolina Commissioner for Agriculture. Mr. B. M. Edwards, President of the South Carolina National Bank, testified that the petitioner had an ample line of credit to have paid for all of the machinery ordered. (R. 137, 139-141, 159-162.)

In the face of all of this testimony showing that the petitioner acted in good faith in placing his order, how could the Court of Appeals say that the jury reached an improper conclusion in giving the petitioner a verdict?

The Court of Appeals also held that the District Judge erred in instructing the jury that if the company set up a voluntary rationing system it had to run it fairly and give to each dealer his due. There was ample testimony and evidence to support this charge and proposition of law. The witnesses for the company testified that the period 1940-41 was the base period on which the allotment system was worked. The dealers were supposed to be alloted a pro-rata amount of the machinery produced according to their sales during that period. (R. 32-37.) It was shown that in that period the petitioner led the other dealers in sales of almost every type of machinery. (R. 197.) An officer of the

company testified that if the petitioner led the other dealers in 1940-41 he was entitled to receive proportionately more machinery produced than the other dealers and if he did not receive it he did not get what he was entitled to. (R. 179-180.) The petitioner testified that other dealers with smaller areas than he had were getting more machinery than he was. (R. 143-146.) He also testified that another dealer, R. U. Fox, received so much machinery that he had to advertise it in a nationally distributed magazine. (R. 158.) This fact was admitted by Mr. Fox (R. 176). The petitioner also showed that he outsold Mr. Fox in the 1940-41 base period (R. 197).

We submit that these facts presented a fair question for the jury in the case and when they decided the case in favor of the petitioner at the trial the Court of Appeals had no right to rehash the evidence and decide the case otherwise.

The Supreme Court of South Carolina has said on numerous occasions that a verdict is not to be set aside except where there is no evidence to support it. *Pinkussohn Cigar Co. v. Clyde Steamship Co.*, 101 S. C. 429, 85 S. E. 1060; *Wells v. Sumter Trust Co.*, 124 S. C. 244, 117 S. E. 519; *Long v. Carolina Baking Co.*, 193 S. C. 225, 8 S. E. (2d) 326.

In the case of *Pinkussohn Cigar Co. v. Clyde Steamship Co. supra,* the Court said:

"The jury in the trial Court found that the damage occurred while the goods were in defendant's possession. It is needless to say that we have no jurisdiction to review the findings of fact, unless they are wholly unsustained by evidence."

This Honorable Court has recently voiced an opinion on this subject in two cases, *Lavender v. Kurn et al.*, 327

U. S. 645, 66 S. Ct. 740; *Tennant v. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 35, 88 L. Ed. 520, 525. In this latter case, at the page indicated, this Court spoke as follows:

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

The Court of Appeals for the Fourth Circuit has done, in this case, exactly what this Honorable Court said it could not do in the *Tennant case*. It has rehashed and reweighed the evidence and set aside the jury verdict merely because the Court thought that the jury could have reached a different conclusion that was more reasonable. If we consider the decision of the Court of Appeals in the light of the cases decided by the Supreme Court of South Carolina, or in the light of the cases decided by this Honorable Court, we find it wanting because there was ample evidence to sustain the jury's verdict. For these reasons we submit that the Court of Appeals erred in reversing the judgment of the District Court and that judgment should be reinstated.

Point II

It was error on the part of the Court of Appeals to rule that the District Judge should not have charged the jury that if the company operated a voluntary rationing system it had to be operated fairly and each dealer given his due share or else the company would be liable to the dealer who was treated wrongly in the amount of the net profit the dealer would have earned on the goods that the company failed to deliver, (R. 199-204; 173 F. (2d) 818, 820), the error being that,

(a) No exception was ever taken to this charge, and,

(b) The charge stated a correct proposition of law that was given to explain one of the company's defenses.

A

Rule 51 of the Federal Rules of Civil Procedure provides:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

The Court of Appeals for the Fourth Circuit has passed on this question very recently in the case of *Meadows et al v. United States,* 144 F. (2d) 751, 753 and had this to say:

"On the second point, as to the charge of the judge to the jury, the record shows that there was no exception to the charge at the time it was made. Objections to the charge of a trial judge should be called to his attention at the time and if this is not done the objection cannot be raised for the first time on appeal. This rule was laid down by Taft, C. J. in the acse of *Brevard Tannin Co. v. J. F. Mosser*

Co. et al., 4 Cir., 288 F. 725, 731. In that case Judge Taft said:

"In the face of this formidable array of authority from the Second, Fifth, Sixth and Ninth Circuit Courts of Appeals, we should be inclinded to hold that the exceptions in this record were not duly reserved and are not properly before us."

"This is, without exception, the rule in federal courts."

Now, if the attorneys for the Allis-Chalmers Mfg. Co., themselves were barred from asking the Court of Appeals for the Fourth Circuit to reverse the judgment of the District Court on these grounds how could the Court itself do the same thing?

The rule stated above is not simply the rule of the Court of Appeals of the Fourth Circuit. This rule is generally adopted by all of the Federal jurisdictions. In addition to this, the Federal Courts that have had an opportunity to pass on the question hold that judicial instructions on a trial that are not objected to become the law of the case. In *Rittgers v. United States,* 8 Cir., 154 F. (2d) 768, 772, the Court said this:

"It is argued by the Government that cohabitation following a marriage contract is not essential to constitute a common law marriage. There would seem at least to be two conclusive answers to this contention. First, it is in the teeth of the explicit instructions of the court heretofore quoted. These instructions were not excepted to by either of the parties and therefore constitute the law of the case."

Since then, the company made no objection to the charge of the District Judge and since it became the law of the case on appeal the Court of Appeals committed error in reversing the judgment of the District Court and that judgment should be reinstated.

B

We submit also that the Court of Appeals should not have reversed the judgment of the District Court on the basis of this charge because it was a proper one. We have been unable to find any South Carolina cases on the subject of pro-rata distribution or voluntary allotment and therefore the federal decisions will be controlling on the subject. In the case of *Acme Mfg. Co. v. Arminius Chemical Co.*, (1920 C. C. A. 4th) 264 Fed. 27, (affirmed on appeal in - (1921 C. C. A. 4th) - 275 Fed. 1021, and writ of *certiorari* denied in (1921) 257 U. S. 647, 66 L. Ed. 415, 42 S. Ct. 55) the Court of Appeals of the Fourth Circuit said that a seller is entitled to the defense of pro-rata deliveries where he finds it impossible, from causes over which he has no control, to fulfill the contract; that in such cases he is required to do the next best thing, to wit, to apportion the amount available among all his customers, giving to each one his ratable share; that this is an exception to the general rule, and is only applied for the relief of any unfortunate seller who has, by conduct, shown that he has in good faith made an honest effort to carry out the provisions of his contract; that, in order to enable a seller to avail himself of this defense, it must appear that he has treated all customers with absolute fairness, and that he has done all that could be expected from one whose purpose is but fair dealing, giving each of his customers the ratable share to which he is entitled under the contract, See also, *Corona Coal Co. v. Hyams Coal Co.*, 9 F. (2d) 361.

Here the Court of Appeals for the Fourth Circuit has stated with approval the same proposition of law as did the District Judge. But says the Court of Appeals that proposition of law is not applicable to the case of *Green, etc. v. Allis-Chalmers, etc.*, because the contract in this case calls for an order to be placed by Green, the petitioner

herein. If that be true, then it was a jury question as to whether or not the order was placed in good faith and it was not within the province of the Court of Appeals to reverse the judgment of the lower court on the ground that the order was not placed in good faith.

However, the company, the appellant before the Court of Appeals, had set up in their pleadings the defense of distribution under a voluntary rationing plan (R. 7-8). The District Judge in his pretrial conference stated that this was one of the defenses interposed to the plaintiff's cause of action by the defendant, the company.

The Honorable Judge said this:

"As matters of defense the defendant claims: (b) that the agreement provided that delays in delivery of goods ordered would be excused if due to causes beyond the defendant's control, such as * * * the voluntary or compulsory application of priority ratings, and delays in * * * getting materials" (R. 10).

Certainly, since the company raised this issue it was proper for the Trial Judge to make a correct charge to the jury on the question. But the Court of Appeals has reversed the decision of the District Court and decided the case in favor of the company because of a correct charge on the law by the District Judge on a question raised by the company as a part of their defense. This is, indeed, an anomolous situation. Never before, at law, has a party lifted itself so high by its own boot straps. The company has caused the District Judge to make a charge to the jury on a question of law raised by its own answer. The Judge has made that charge correctly. Now, the Court of Appeals has reversed the case in favor of the company because the charge was made. Certainly, the company could not have alleged error in their appeal because of the District Judge's charge.

Having caused the case to go to the jury on that theory it was estopped to do so. *Indiana Flooring Co. v. District Nat. Bank of Washington,* 280 F. 522, 51 App. D. C. 391; *Bort v. E. H. McCutchen & Co.,* 187 F. 798, 109 C. C. A. 558; *Grant Storage Battery Co. v. DeLay,* 87 F. (2d) 726; *Kingrey v. New York, C. & St. L. Ry. Co.,* 297 F. 376; *Weinstein v. Studebaker Corp.,* 238 F. 963; *Smith, et al. v. Town of Orangetown et al.,* 150 F. (2d) 782.

It seems to us a most inequitable proposition of law that would allow a court to do for a party to a suit that which the party to the suit is barred to do for himself and thereby decide the case in that party's favor. We respectfully submit that this ruling of the Court of Appeals was erroneous and the judgment of the District Court should be restored.

All of which is respectfully submitted.

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